



Equalisation Levy

Taxing cross-border e-commerce transactions

Introduction

As an interim measure to tax transactions arising in a digital economy, India introduced an 'equalisation levy' in the year 2016. This levy was applicable on the gross consideration received by a non-resident for online advertisement, digital advertising and related services from specified persons. In the year 2020, the scope of the equalisation levy was extended to cover non-resident e-commerce operators within its ambit. **As per the expanded provisions, with effect from April 1, 2020, consideration received by a non-resident e-commerce operator from e-commerce supply or service is liable to equalisation levy at the rate of 2% .**

Snapshot of equalisation levy provisions

The definitions of e-commerce operator and e-commerce supply or services are very wide and can have potentially far-reaching implications for transactions which may not be regarded as in the nature of e-commerce as understood in common parlance. The same could apply to companies which may not regard themselves as 'e-commerce operators'.

The key contours of the equalisation levy, as applicable to non-resident e-commerce operators, are tabulated below:

Applicability	Applicable to a non-resident e-commerce operator who is engaged in e-commerce supply or services (see below).
Person responsible for paying equalisation levy in India	Non-resident e-commerce operator

Definition of 'e-commerce operator'	A non-resident who owns, operates or manages a digital or electronic facility or platform for the online sale of goods or online provision of services, or both.
Specified services on which equalisation levy applies	<ul style="list-style-type: none"> • Online sale of goods owned by the e-commerce operator; • Online provision of services provided by the e-commerce operator; • Online sale of goods or provision of services (or both), facilitated by the e-commerce operator; • Sale of advertisement which targets an Indian resident customer, or which targets a customer who accesses the advertisement through an IP address located in India; • Sale of data collected from an Indian resident or from a person who uses an IP address located in India.
Service recipient	<ul style="list-style-type: none"> • Any person resident in India; • Any person who buys goods or services (or both) using an IP address located in India; • Any non-resident in respect of off-shore sale of advertisements which target Indian customers; • Any non-resident to whom data is sold which is collected from an Indian resident or from a person who uses an IP address located in India.
Rate of equalisation levy	2%.

Exemption from equalisation levy	<p>Exemption is currently provided, inter alia, in the following cases:</p> <ul style="list-style-type: none"> • Non-resident e-commerce operators with a Permanent Establishment ('PE') in India and where the e-commerce transaction is effectively connected to such PE in India; • Cases where the aggregate value of consideration for the specified transactions does not exceed INR 20 million (approx. USD 265,000) in a year.
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Companies which facilitate businesses through front end or back end digitisation will need to review whether their transactions could be covered under the equalisation levy provisions.

What are the compliance obligations?

The equalisation levy provisions cast an obligation on the non-resident e-commerce operator to pay equalisation levy within the following applicable due dates on a quarterly basis:

Quarter	Date of ending of the quarter of the financial year	Due date for making payment
1	30th June	7th July
2	30th September	7th October
3	31st December	7th January
4	31st March	31st March

Industry impact

The practical challenges posed by the implementation of the equalisation levy have been exacerbated because there is currently very limited guidance available in statute on a number of issues. Apart from the e-commerce retailers who predominantly transact through e-commerce business models, digitisation of business transactions is now common even amongst companies that traditionally operated through physical models. The equalisation levy applies to an e-commerce operator which can potentially include not only e-commerce retailers/ marketplace operators but also businesses which operate under the brick and mortar model with a fair degree of digitisation.

In our view, there are strong arguments to contend that the equalisation levy provisions are unconstitutional and hence a fit case to challenge them before the Courts. Be that as it may, we have briefly set out below the industry impact, compliance obligations, and practical issues and challenges.

In order to enable the payment of equalisation levy within the due date of 7th July, the Central Board of Direct Taxes ('CBDT') has amended the existing payment challan (viz, ITNS 285) so as to permit the use of the same challan for payment of equalisation levy in case of non-resident e-commerce operators. It is important to note that the challan mandatorily requires the non-resident e-commerce operators to also quote their Permanent Account Number ('PAN').

In addition to the quarterly payments, non-resident e-commerce operators are also required to file an annual statement in respect of all such transactions conducted on or before 30th June following the end of the Indian financial year which runs from April to March. Failure to comply with the provisions (such as failure to deduct or pay the equalisation levy) attracts interest and penal consequences. Prosecution proceedings can also be invoked by Indian Revenue in certain circumstances.

Several industries and business models could potentially be impacted under the equalisation levy provisions; some of which are illustrated below:



Retail

- Online sale of goods
- Online provision of services



Marketplace / aggregators

- Facilitation of sale of goods or services



Media and entertainment

- Streaming of content through OTT platforms
- Gaming platforms
- Online subscription to print media (e-magazines, etc.)



Education

- Foreign universities offering e-courses
- Online examinations



Travel and hospitality

- Online ticketing services
- Hotel bookings



Communication

- Voice calls through internet
- Video conferencing



Information technology

- Software sales
- Sale of customised software
- Provision of IT enabled services



Others

- Transactions through internal ERP platforms
- Front-end or back-end digitization

Practical issues and challenges

Whom shall the equalisation levy apply to and who will be construed as an e-commerce operator?

1

What constitutes a digital or electronic facility/ platform? Is advice rendered through email or telephone covered?

2

Quantum of 'consideration' in context of marketplace models/ aggregators to which the equalisation levy could apply

3

Applicability to inter-company transactions and reseller arrangements? No exemption provided

4

Applicability in cases where services are ordered or booked online but delivered offline? (say, hotel bookings, etc.)

5

Mismatch between date of applicability of equalisation levy (April 1, 2020) and corresponding exemption from income-tax (April 1, 2021) – potential double whammy?

6

Will equalisation levy be creditable against taxes in overseas jurisdiction?

7

Interplay with indirect taxes

8

One-off transaction of a non-resident (while on a visit to India) purchasing goods online (which are to be delivered at his residence overseas) using an Indian IP address

9

How can Dhruva assist?

Analysing whether the company will be regarded as an e-commerce operator so as to be covered within the equalisation levy provisions

1

Assist in determining transactions which fall under the ambit of the equalisation levy

2

Advocacy on various aspects where the scope/applicability is not clear

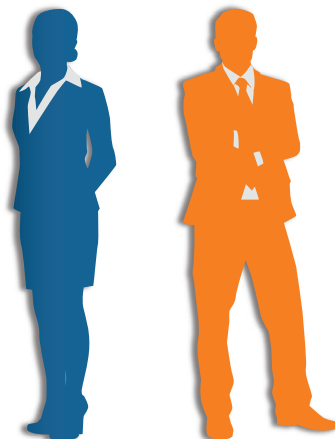
3

Challenging the constitutional validity of the equalisation levy provisions before the Courts

4

Review / restructure existing business models and documentation

5



6

Evaluate potential opportunities to mitigate the incidence of the levy

7

Advise in putting requisite infrastructure and other processes in place for ascertaining the amount of equalisation levy payable in India

8

Where equalisation levy is applicable – obtain tax registrations, collate data and ensure levy is discharged to avoid interest/penal consequences

9

Provide integrated and holistic solutions post considering levies under indirect tax and other laws e.g. OIDAR services

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- Strategic approach to complex problems
- In-depth, specialised and robust advice
- Strong track record of designing and implementing pioneering solutions
- Trailblazers in tax controversy management
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- Technical depth and quality

We believe in thinking out of the box, handholding our clients in implementing complex solutions and working towards achieving results. We have offices in Mumbai, Ahmedabad, Bengaluru, Delhi, Kolkata, Pune, Singapore, Dubai. We advise clients across multiple sectors including financial services, IT and IT-enabled services (ITES), real estate and infrastructure, telecommunications, oil and gas, pharmaceuticals, chemicals, consumer goods, power, as well as media and entertainment.

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- Dhruva Advisors in 2019 for the first time ranked as a Tier 1 Firm in India for Indirect Taxes in International Tax Review’s Indirect Tax Guide.



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